

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

Application Seeking Consent To The)	
Assignment Of The License For)	
Broadcast Television Station KBEH(TV),)	MB Docket No. 17-121
Oxnard, California, From Hero)	BALCDT-20170428AAS
Licenseco LLC To KWHY-22 Broadcasting,)	
LLC)	

**JOINT COMMENTS OF BROADCASTERS FOR FREE MARKET LICENSE
TRANSACTIONS**

The Broadcasters for Free Market License Transactions, an *ad hoc* group consisting of CNZ Communications, LLC; Commonwealth Public Broadcasting Corp.; Latina Broadcasters of Daytona Beach, LLC; London Broadcasting, Co.; OTA Broadcasting, LLC; Rancho Palos Verdes Broadcasters, Inc.; WGBH Educational Foundation; and WRNN License Company, LLC (“Free Market Commenters”), submit these comments in support of the application for the assignment of television station KBEH(TV), Oxnard, California (Fac. ID No 56384) from Hero Licenseco LLC to KWHY-22 Broadcasting, LLC (the “KBEH Application”). While the Free Market Commenters take no position on the merits of the specific transaction proposed in the KBEH Application, they desire to comment more broadly on the free transferability of the licenses of stations that submitted successful bids to channel share in FCC Auction 1001 (the “Incentive Auction”).¹ Collectively, the Free Market Commenters own 43 full power or Class A

¹ Although the Commission’s rules do not expressly provide for the filing of formal comments in support of an application for the assignment of a broadcast television license, the Public Notice issued by the Media Bureau on May 8, 2017, expressly contemplates the filing of comments. *See Media Bureau Announces Permit-But-Disclose Ex Parte Status for The Application Filed Seeking Consent to The Assignment of the License For Broadcast Television Station KBEH(TV), Oxnard, California, From Hero Licenseco LLC To KWHY-22 Broadcasting, LLC*, Public Notice,

television stations, including 15 stations that submitted successful bids to channel share in the Incentive Auction and 28 stations assigned channels in the post-auction broadcast television band. The Free Market Commenters are concerned that by failing to process applications to assign the licenses of winning channel share bidders in the normal course of business, the Media Bureau is disrupting the allocation of licenses through free market mechanisms and unnecessarily interfering with the reasonable, Commission-driven expectations of licensees that participated in the Incentive Auction.²

The KBEH Public Notice has already stymied several transactions of which the Free Market Commenters are aware, as parties await further guidance on how the Commission will process applications many broadcasters always believed were consistent with existing FCC Rules. Given the short timeline for broadcasters to enter into and enact channel sharing arrangements, any delay could hinder both individual transactions and the post-auction transition as a whole. Accordingly, the Media Bureau should quickly remove any uncertainty it has created by promptly processing the KBEH Applications on delegated authority.

I. THE ASSIGNMENT OF A LICENSE THAT SUBMITTED A SUCCESSFUL BID TO CHANNEL SHARE DOES NOT RAISE ANY NEW OR NOVEL POLICY ISSUES.

The KBEH Public Notice is based on the flawed premise that an application for “the sale of a winning relinquishment bidder in conjunction with the implementation of a Channel Sharing

DA 17-434 (MB May 8, 2017) (the “KBEH Public Notice”) (stating that “comments and/or petitions may be filed using our Electronic Comment Filing System (ECFS).”).

² Consistent with the approach adopted by the Commission, the Free Market Commenters use the terms “channel share bid” and “channel share bidders” to refer both to stations that filed channel sharing agreements with their Auction 1001 applications and those that indicated an “intent to channel share.” See *In the Matter of Expanding the Economic & Innovation Opportunities of Spectrum Through Incentive Auctions*, First Order on Reconsideration and Notice of Proposed Rulemaking, 30 FCC Rcd. 6668 ¶ 14 (2015) (“Sharing Recon Order”) (explaining that “pre- and post-auction CSAs are the same for purposes of the Spectrum Act”).

Agreement . . . involves primarily issues of broadly applicable policy rather than the rights and responsibilities of specific parties.”³ The assignability of a license that was a subject of a successful bid to relinquish its spectrum-usage rights in the auction has always been incorporated into the FCC’s rules for post-auction channel sharing. Accordingly, there is nothing new or novel about the KBEH Application that the Commission has not already resolved. The only issue before the Media Bureau is whether the application is consistent with the Commission’s existing rules for assignment of a broadcast license and its existing rules governing the Incentive Auction.

The Free Market Commenters can only conceive of two possible arguments in support of the view that the KBEH Application raises new or novel issues: (1) that the Commission did not intend for licenses that were the subject of a successful bid to channel share to be assignable; or (2) that the Spectrum Act or the Commission’s Rules require the licensee that submitted a successful bid to implement channel sharing before the license can be assigned. Neither has any merit.

A. The FCC’s Incentive Auction Rules Unambiguously Permit the Assignment of Licenses That Are the Subject of a Successful Bid to Channel Share.

The Commission has always contemplated that a station that was the subject of a winning bid to channel share can be assigned, and the FCC Rules reflect this understanding. The Commission’s channel sharing rules identify five provisions that must be included in every channel sharing agreement, one of which is “transfer/assignment of a shared license, including the ability of a new licensee to assume the existing CSA.”⁴ The agency explained in the Incentive Auction Order that “[w]hile channel sharing partners will be required to address these matters in their CSAs, they may craft provisions as they choose, based on marketplace

³ KBEH Public Notice at 1 n.3.

⁴ 47 C.F.R. § 73.3700(h)(5)(D).

negotiations.”⁵ Thus, not only did the FCC intend to permit the assignability of licenses that submitted successful bids to channel share, but it expressly adopted a “light-handed regulatory” approach that would allow the marketplace, rather than the Commission, to determine the conditions under which license assignments would be permitted.

In fact, the FCC’s approach has only become more flexible since the agency first adopted its rules for the Incentive Auction. The Incentive Auction Order originally included a footnote declaring that “[a]ny rights of first refusal included in a CSA would have to be consistent with our media ownership rules and any other Commission rules and policies,” citing the Commission’s prohibition on retention of reversionary interests.⁶ On reconsideration, however, the Commission reversed course, allowing broadcasters to “include contingent rights such as puts, calls, options, rights of first refusal, and other common rights in their CSAs” and explaining that “contracting for these common contingent rights will enable sharing parties to eliminate some of the uncertainty regarding the identity of their sharing partners in the event that one sharing party decides to sell its license.”⁷ This change made it abundantly clear that the FCC intended to permit broadcasters to assign the license of a station that submitted a successful bid to channel share.

B. Congress and the FCC Contemplated That a Winning Channel Share License Could Be Assigned Prior to Implementation of Channel Sharing.

Both the Spectrum Act and the Commission’s Rules provide broadcasters with the flexibility to have one licensee relinquish spectrum in the Incentive Auction and a different

⁵ *In the Matter of Expanding the Economic & Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd. 6567, 6852 ¶ 699 (2014) (“Incentive Auction Order”).

⁶ *See id.* ¶ 699 n. 1942.

⁷ Sharing Recon Order ¶ 10.

licensee implement channel sharing. In drafting the Spectrum Act, Congress distinguished between the party that relinquishes spectrum in the auction—the “broadcast television *licensee*”—and the party that participates in channel sharing—the “broadcast television *station*.”⁸ Specifically, Congress described the three “eligible relinquishments” in the Incentive Auction, which include “[r]elinquishing usage rights in order to share a television channel with another license,” as an act of the “licensee.”⁹ However, when describing the carriage rights of channel sharing parties, Congress chose to use the term “broadcast television station” instead.¹⁰ “[W]here different terms are used in a single piece of legislation, the court must presume that Congress intended the terms to have different meanings.”¹¹ Thus, by requiring the licensee to relinquish spectrum usage rights but referring only to the carriage rights of the station upon implementation, Congress clearly intended to preserve the ability of a broadcaster to assign its license to another party prior to implementing a channel sharing agreement.

In its implementation of the Spectrum Act, the Commission itself provided broadcasters with the flexibility to assign their licenses prior to commencing channel sharing. The Incentive Auction Order makes the same distinction between a “licensee” and a “channel sharing station”

⁸ *Compare* Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6403(a)(1) (codified at 47 U.S.C. § 1452), 126 Stat. 156 (2012) (emphasis added) *with id.* § 6403(a)(4) (emphasis added).

⁹ *Id.* § 6403(a)(2).

¹⁰ *Id.* § 6403(a)(4).

¹¹ *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1240 (D.C. Cir. 2007) (quoting *Transbrasil S.A. Linhas Aereas v. Dep't of Transp.*, 791 F.2d 202, 205 (D.C. Cir. 1986)); *see also* *See Ass'n of Maximum Serv. Telecasters v. F.C.C.*, 853 F.2d 973, 978 (D.C. Cir. 1988) (finding that Congress would not have used two different words if it intended to convey same meaning) Office of the Legislative Counsel, US Senate, *Legislative Drafting Manual* (1997), available at [http://www.law.yale.edu/documents/pdf/Faculty/SenateOfficeoftheLegislativeCounsel_LegislativeDraftingManual\(1997\).pdf](http://www.law.yale.edu/documents/pdf/Faculty/SenateOfficeoftheLegislativeCounsel_LegislativeDraftingManual(1997).pdf); Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in *Benchmarks* 224 (1967) (“when Congress employs the same word, it normally means the same thing, when it employs different words, it usually means different things”).

that Congress made in the Spectrum Act.¹² This distinction flows from the FCC’s overall desire to make channel sharing as flexible as possible. In the FCC’s 2012 Channel Sharing Order (its first Order implementing the Spectrum Act mandate), the Commission acknowledged that “the Spectrum Act does not set a date restriction on the execution of channel sharing arrangements.”¹³ Based on this flexibility, the agency, in its Sharing Recon Order, concluded that it had the authority to permit parties to enter into channel sharing agreements after the Incentive Auction and that doing so would advance the public interest by: (i) “encourage[ing] broadcasters to consider the channel sharing bid option”; and (ii) “help[ing] to preserve independent voices.”¹⁴

In stark contrast to the explicit language of both the Spectrum Act and the FCC Rules permitting the assignment of licenses that were the subject of winning bids to channel share and the general intent to provide broadcasters with flexibility, there is nothing in the Spectrum Act or the Commission’s Rules constraining the ability of parties to assign a valid license at any time. In fact, the Communications Act and the FCC Rules provide broad flexibility to parties seeking to assign their authorizations, provided that “the public interest, convenience, and necessity will be served thereby.”¹⁵ Given the Commission’s consistent position that providing flexibility to

¹² Compare Incentive Auction Order ¶ 365 (“Section 6403(a)(2) of the Spectrum Act requires the Commission to make available three voluntary relinquishment options to eligible full power and Class A broadcast television *licensees* . . .”) (emphasis added) with *id.* ¶ 706 (“A channel sharing station is entitled to the same cable and satellite carriage rights at its shared location as it would have at that same location were it not channel sharing.”) (emphasis added).

¹³ *Innovation in the Broadcast Television Bands: Allocations, Channel Sharing and Improvements to VHF*, Report and Order, 27 FCC Rcd. 4616, 4627 ¶ 21 (2012) (“2012 Channel Sharing Order”).

¹⁴ *In the Matter of Expanding the Economic & Innovation Opportunities of Spectrum Through Incentive Auctions*, First Order on Reconsideration and Notice of Proposed Rulemaking, 30 FCC Rcd. 6668, 6673 ¶ 14 (2015)

¹⁵ 47 U.S.C. § 310(d).

channel sharing stations is in the public interest, the KBEH Application does not raise any new or novel questions that the Media Bureau cannot address on delegated authority.

A determination that the KBEH Application raises new or novel issues would needlessly prioritize form over substance. The FCC Rules clearly provide that: (1) a station that submitted a successful bid to channel share can implement its a channel sharing agreement at any time within six months of receiving its reverse auction proceeds (without availing itself of any waivers);¹⁶ and (2) a licensee can assign its station and the corresponding channel sharing agreement at any time after implementing channel sharing¹⁷. Thus, there would be nothing new or novel about a licensee that submitted a winning channel sharing bid implementing its channel sharing agreement in accordance with the Commission Rules and immediately seeking to assign its license. It would be arbitrary and capricious to hold that a different path to the same result—assigning the license prior to commencing channel sharing—is new and novel. This is particularly true where, as in the case of the KBEH Application, the assignment application (or a corresponding application for a minor change to channel share) clearly identifies the assignee’s plans for channel sharing upon consummation of the assignment.

For the foregoing reasons, the KBEH Application does not raise any issues of broadly applicable policy not already resolved by the Commission, and the Media Bureau should process the KBEH Application on delegated authority.

¹⁶ 47 C.F.R. § 73.3700(b)(4)(ii) (“The licensee of a channel sharee station and a licensee of a license relinquishment station that has indicated in its Form 177 an intent to enter into a post-auction channel sharing agreement must comply with the notification and cancellation procedures in §73.1750 and terminate operations on its pre-auction channel within six months of the date that the licensee receives its incentive payment pursuant to section 6403(a)(1) of the Spectrum Act”).

¹⁷ See 47 C.F.R. § 73.3700(h)(5)(D); Sharing Recon Order ¶ 20 (permitting broadcasters “to choose the length of their channel sharing agreements”).

II. THE COMMISSION OR THE MEDIA BUREAU SHOULD RESOLVE THE CONFUSION CREATED BY THE KBEH PUBLIC NOTICE AND CLARIFY THAT SIMILARLY-SITUATED APPLICATIONS WILL BE EXPEDITIOUSLY PROCESSED.

Given the uncertainty created by the KBEH Public Notice and the critical time constraints for the post-auction transition, generally, and for implementing channel sharing agreements, specifically, the Commission or the Media Bureau should clarify that future applications that comply with the Commission's rules will be expeditiously processed. The Free Market Commenters expect that numerous additional applications will be filed in the coming weeks and months to assign the licenses of stations that submitted a successful bid to channel share (many of which are currently delayed due to the uncertainty created by the KBEH Public Notice). While the details may differ, the underlying legal principle will be the same: a new licensee will be acquiring the license with the intent to implement a channel sharing agreement within the timeframes established by the Commission for commencing channel sharing.

Permitting flexible assignment of the licenses of stations that were the subject of a successful bid to channel share will preserve the "very important public interests" served by over-the-air broadcast television.¹⁸ These channel sharing stations will continue to be bound by all applicable public interest requirements and provide another free, over-the-air television service to viewers in their communities. At the same time, without the ability to assign their licenses, many licensees that submitted winning channel sharing bids might simply surrender their licenses and remove another potential source of localism, competition, and diversity from the broadcast airwaves.

¹⁸ 2012 Channel Sharing Order ¶ 1.

There is simply no reason for the Commission to risk the loss of a free, over-the-air television station where there is sufficient demand for that license. The foundation of the Incentive Auction was to create a “voluntary, market-based means of repurposing spectrum” that will ensure that spectrum is “put to its highest valued use.”¹⁹ Allowing for flexible transferability of licenses subject to successful channel sharing bids will help fulfill this goal.

To the extent necessary, then, the FCC should clarify that licenses subject to successful channel sharing bids are freely assignable, subject to the Commission’s general public interest review under Section 310 of the Communications Act and the applicable Commission Rules. The FCC should make clear that this policy applies without regard to whether: (1) the assignee has identified a station with which to channel share; (2) the assignee already owns a station from which the assigned station can channel share; or (3) a minor change application has already been filed for the station to be assigned. Ultimately, the assignee will be bound by the same rules and deadlines as the licensee that submitted the winning bid, so these remaining details are immaterial.

III. CONCLUSION

For the foregoing reasons, the KBEH Application does not raise any new or novel issues, and the Media Bureau should process the application on delegated authority. Meanwhile, given the uncertainty created by the KBEH Public Notice, the Commission or the Media Bureau should clarify that licenses subject to successful channel sharing bids are freely assignable, subject to

¹⁹ *In the Matter of Expanding the Economic & Innovation Opportunities of Spectrum Through Incentive Auctions*, Notice of Proposed Rulemaking, 27 FCC Rcd. 12357 ¶¶ 3, 146 (2012).

the Commission's general public interest review under Section 310 of the Communications Act and the applicable Commission Rules.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2017, a copy of the foregoing was served upon the applicants by sending a copy by electronic mail to:

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